REVISIONAL CRIMINAL

Before Mr. Justice Kendall

EMPEROR *v.* MUNSHI LAL* 1933 *March*, 15

Municipalities Act (Local Act II of 1916), sections 2, 186—"Building"—Chabutra with temporary awning or shed over it—Municipalities Act (Local Act II of 1916), section 307—Continuing breach—Daily fine imposed in anticipation at the time of first conviction.

A masonry-work chabutra with a *pal* or shed over it, even though the latter may be of a temporary character, comes within the definition of a building in section 2 of the Municipalities Act. The putting up of a *pal* or shed, though not of a permanent character, on poles driven into a masonry-work chabutra amounts at least to "altering part of a building", if not to actually "erecting a building", within the purview of section 2.

A Magistrate, when convicting under section 307(2) of the Municipalities Act for non-compliance with a notice issued by the Municipal Board for the removal of a building, sentenced the accused to a fine of Rs.10 and to a further fine of Re.1 per day for such time as he might continue the breach. *Held*, that the order of daily fine, passed in anticipation of continuing breach, was illegal. Further proceedings had to be taken in case the breach was continued, and upon such second conviction a fine, calculated at the maximum rate of Rs.5 per day of the actual period of persistence in the breach, could be imposed.

Mr. *Kartar Narain Agarwala*, for the applicant.

Mr. *K. Verma*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL, J.:—This is a reference made by the Additional Sessions Judge of Aligarh with the recommendation that the order of conviction passed by a Magistrate under section 307 of the United Provinces Municipalities Act, 1916, be quashed. The applicant, whose application has been approved by the Additional Sessions Judge, is in possession of one of the plots which

*Criminal Reference No. 878 of 1932

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have been leased out by the Municipal Board of Etah on payment of *tahbazari* or ground cess from day to day. On this plot there is a chabutra which has either been built by the applicant or, as he contends, has been standing on the plot for some years. Neither of the courts has come to a definite decision on the question of whether the chabutra itself, which is a masonry construction, is an old or a new one; but the reason why the Board took action was that he recently set up a shed on the chabutra, and the Board therefore issued a notice to him under section 186 of the Act on July, the 7th, 1932, to remove the chabutra and the shed. He did not do so, and he was therefore prosecuted and fined under section 307 of the Act.

One of the points to which the Judge has referred, and which has been pressed in argument before me, is that as the Board sent to the applicant a second notice on July, the 16th, directing the applicant to quit the land, it had waived the first notice of July the 7th. I have not, however, been able to understand how the second notice could operate as a waiver, for it appears to deal with a separate and distinct matter. The applicant, as I have said, was in possession of the plot on payment of *tahbazari* dues. He might be able to remain in possession of the plot even if he had to remove the chabutra, and although the Board may have issued a notice to him to quit on account of his failure to comply with their direction to remove the chabutra, it does not appear to me that by directing him to quit the Board waived their right—if indeed such a right exists—to have the chabutra removed.

The real crux of the problem is whether the chabutra with the shed erected on it is a "building" as defined in section 2 of the Act. The notice given by the Board was issued under section 186, under which it has authority to direct the owner or occupier of any land to "stop the erection, re-erection or alteration of a building or

part of a building . . . in any case where the Board considers that such erection, re-erection, alteration, construction or enlargement is an offence under section 185, and may in a like manner direct the alteration or demolition, as it deems necessary, of a building, part of a building or construction as the case may be." It has not been suggested that, if the construction is a building, the Board was not justified in considering that the erection or alteration, etc., was an offence under section 185, but it has been strongly contested that the construction is not a building.

A building is defined in section 2 of the Act as "a house, hut, shed or other roofed structure for whatsoever purpose and of whatsoever material constructed, and every part thereof, but shall not include a tent or other such portable and merely temporary shelter." The Magistrate, without considering in great detail the definition of the word "building", held that as the applicant was only entitled to possession of the plot from day to day, he had no right to execute a work of a permanent character, and that as he had been repairing the chabutra and had put a shed upon it, he certainly had been executing a work of a permanent character. The Judge, on the other hand, held that "the mere putting of *pal* for temporary shelter from the sun would not make it a shed or a building." No doubt there is support for the view that a temporary protection against heat or rain is not a building, in the decision of Sir GEORGE KNOX in the case of *Kamta Nath* v. *Municipal Board of Allahabad* (1). The question here, however, is not only whether the construction which has been put on the chabutra by way of a roof is a building, but whether the permanent chabutra itself with a roof upon it comes within the definition of a building in the Act. That definition, as Mr. *Kamla Kant Verma* has pointed out, shows that the legislature had in mind two things, (1) the permanence or otherwise of a structure and (2) the roof. Now, it is

(1) (1905) I. L. R., 28 All., 199.

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not denied that the chabutra itself is a permanent structure. It is certainly not a "tent or other such portable and merely temporary shelter" and the only reason that could be urged for holding that the chabutra is not a "building" is that it has not or had not a roof. The applicant, however, himself supplied the deficiency by setting up a roof thereon. The roof itself may not be of such a permanent nature as the chabutra, though I am informed that it is set up on poles which have been driven firmly into the chabutra. So long, at any rate, as the roof exists, it appears to me quite clear that the chabutra with the roof must be held to come within the definition of a building, and indeed that seems to have been the view taken by the advisors of the Municipal Board, because they do not seem to have taken any step against the applicant until he set up the roof. In my opinion therefore the decision of the Magistrate on this point is correct.

It has further been suggested that the Board had no right to issue a notice under section 186 because the applicant was not erecting or re-erecting the chabutra; but by setting up the roof it appears to me to be perfectly obvious that he was at least altering part of a building, if he was not actually erecting a building by setting up the roof on the chabutra.

There is, however, one part of the application on which the applicant is entitled to succeed. The Magistrate not only fined the applicant Rs.10 under section 307 of the Act and ordered him to remove the shed and the chabutra within ten days, but added that "failing to do it he shall pay a further fine of Re.1 per day until such time as he continues the breach." As the Judge has rightly pointed out, it has been held in the case of *Emperor* v. *Amir Hasan Khan* (1) that "The liability to a daily fine in the event of a continuing breach has been imposed by the legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by

(1) (1918) I. L. R., 40 All., 569.

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payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by the institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to the prescribed maximum of Rs.5 per diem."

I therefore accept the reference to this extent that the order of the Magistrate in inflicting a further fine of Re.1 per diem is set aside, but for the rest the Magistrate's order is maintained and the reference is rejected.

APPELLATE CRIMINAL

Before Mr. Justice Young and Mr. Justice Rachhpal Singh

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EMPEROR *v.* IRSHAD ULLAH KHAN AND OTHERS*

Indian Penal Code, sections 34, 302—*Death caused by one out of several persons having a common intention—Common intention to attack a party and prevent irrigation of field—One member, armed with a gun, of the attacking party causing death by shooting—Liability of other members.*

The view that section 34 of the Indian Penal Code applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by a person other than the latter, is not a correct view. Section 34 is applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual. Of course, before section 34 can be applied, the prosecution must prove that the criminal act was done by one of the accused persons in furtherance of the common intention of all. The existence of a common intention is the sole test of the joint responsibility under section 34 of the Indian Penal Code.

*Criminal Appeal No. 952 of 1932, from an order of Joti Sarup, Sessions Judge of Bulandshahr, dated the 14th of October, 1932.